87-152

Supreme Court U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

JIM C. BERGMAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jim C Bergman
62 Ocean
Henderson, Nevada 89015
(702) 564-5008

QUESTIONS PRESENTED

1. Did the repetitious use of terms referring and alluding to "tax protesting" in description of evidence and activities of the Defendant by the prosecution render the trial fundamentally unfair?

2. Was evidence regarding forms W-2 and W-4 admitted contrary to applicable decisions of this Court which unfairly prejudiced the Defendant?

3. Did the trial court abuse its discretion by proceeding to trial in violation of 18 United States Code §3161(C)(2) and the Sixth Amendment provision for adequate counsel when the court appointment of the office of the Public Defender was not accepted by the Defendant and counsel retained by the Defendant less than thirty days before trial, who then requested a continuance on the grounds of inadequate time to prepare for trial due to an unforeseen conflicting trial date?

4. Was the trial court's refusal to accept documents offered into evidence, which were relied upon by the Defendant in establishing his beliefs, an abuse of discretion which deprived the Defendant of the opportunity to support the validity of his claim to a "good faith" defense?

5. When the appointment of the Public Defender is unacceptable to the Defendant and the and the court refuses to acknowledge the motions submitted by the Defendant on his own behalf, does the court, in its insistence that the assistance of counsel consists solely of full representation by an attorney, deprive the Defendant of the right to counsel of his choice secured by the United States Constitution by

requiring the Defendant to waive the statutory right to self-representation in order to secure the right to such assistance of counsel?

6. In instructing the jury that the tax returns filed by the defendant were not returns under Title 26, United States Code §7203, did the trial court, in manifest error, deprive the Defendant of his right to trial by jury on an essential element of the crime charged?

7. Was reference to tax liability in the instructions to the jury unduly prejudicial denying the defendant's right to due process?

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Appeals Order Affirming the conviction of the Petitioner in a criminal case entered on March 31, 1987 by the Ninth Circuit Court of Appeals.

LIST OF PARTIES

The Parties to this action are:

Petitioner/Defendant;

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(702) 564-5008

Respondant/Plaintiff

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OPINION BELOW

The opinion below in the U. S. District Court is unreported. The decision of the trial court was entered as a jury verdict of guilty as charged in case number CR-LV 85-170-PMP in the United States District Court for the State of Nevada on February 24, 1986. Defendant appealed his conviction to the Ninth Circuit Court of Appeals on March 12, 1986 which affirmed the trial court decision on March 31, 1987.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 31, 1987. No Petition for Rehearing was filed. The supreme Court's jurisdiction is invoked pursuant to 28 United States Code §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V, U.S. CONSTITUTION:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

AMENDMENT VI, U.S. CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

18 United States Code §3161(c)(2):

Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and

elects to proceed pro se.

26 United States Code §7203:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than

a return required under authority of § 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than one year, or both, together with the costs of prosecution.

28 United States Code §1654:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

BASIS OF FEDERAL JURISDICTION

Jurisdiction of the trial court in this cause was pursuant to 18 United States Code § 3231. The jurisdiction of the appellate court was pursuant to 28 United States Code § 1291.

STATEMENT OF THE CASE

1 On October 2, 1985 an indictment was filed with the United States District Court charging the defendant, Jim C. Bergman with three counts of willful failure to file income tax returns for the years 1979 to 1981, in violation of Section 7203 of the Internal Revenue Code of 1954 (26 U.S. C.).

Following his jury trial, defendant was found guilty on all counts of the indictment. Defendant was sentenced to a one-year term of imprisonment on Count One. On each of Counts Two and Three, defendant received five-year terms of probation, to be served concurrently with each other and consecutively to the term of imprisonment

imposed on Count One.

Defendant, a journeyman electrician by trade, timely filed forms 1040, U.S. Individual Income Tax Returns and paid the self-assessed tax due for all years prior to 1978. For the years 1978, 1979, 1980 and 1981 the defendant, although earning wages in excess of the amount of income which required the making and filing of an income tax return, timely filed forms 1040 on which he asserted various challenges under the U.S. Constitution without providing information regarding income, social security numbers, or taxes withheld.

Each of the returns was accompanied by documents supporting the defendant's belief

that he had a right to object to the taxing process on Constitutional grounds. Although the Internal Revenue Service informed the defendant that it disagreed with his position, it refused to provide any information on how to acceptably complete the required forms without waiving any Constitutionally protected rights; and the defendant remained unconvinced of the Service's interpretation of the applicable laws.

The defendant desired to represent himself with the assistance of counsel in the proceedings. Although a deputy from the Federal Public Defender's office was assigned to the case, such appointment was unacceptable to the defendant; and court-

appointed counsel moved to withdraw on October 29, 1985, citing as his reason a "basic disagreement regarding the law". The court refused to permit the Public Defender to withdraw as counsel of record.

Defendant filed a Petition to Strike on November 5, 1985, again in proper person, asserting his right to self-representation and objecting to the plea entered by the court on his behalf. Subsequently, the defendant retained his own counsel, who made a Motion for Continuance of the scheduled trial date based upon a conflict in trial schedules and inadequate time to properly prepare defenses which was filed on November 27, 1985. The motion was denied, and the matter was

ordered to proceed to trial on the 9th of December.

By order dated December 2, 1985, both the Motion for Bill of Particulars and the Petition to Strike, filed October 17 and November 5 respectively were stricken. A consent to proceed before the U.S. Magistrate in a Misdemeanor Case was filed with the court on December 5, 1985 and the motion of Defendant to appear in proper person with the assistance of retained counsel was made on December 6, 1985, by Defendant in proper person. This latter motion was granted by the court, and the matter proceeded to trial on that basis.

During the trial, exception was taken to several actions of the court upon which the

issues herein are raised. Objection was made to the introduction of forms W-2 and W-4 as irrelevant and prejudicial. The prosecution repeatedly used terms to describe evidence and the activities of the defendant which by implication labeled him a "tax protestor". The court refused to permit the introduction of materials which the defendant used to form and base his beliefs in the validity of his actions.

Finally, the instructions to the jury included references to the defendant's tax liability and directing that the documents filed by the Defendant were not "returns" within the meaning of the statute relating to willful failure to file Federal income tax

returns.

The Court of Appeals for the Ninth Circuit affirmed the defendant's conviction on all three counts of the indictment. It found the use of terms "tax protester" permissible in reference to the defendant's activities based on its conclusion that the term accurately characterizes activities based on objections to filing tax returns which it has rejected, United States v. Malquist, 791 F. 2d 1399, 1402 (9th Cir.), cert. denied, 107 S. Ct. 445 (1986); United States v. Smith, 735 F.2d 1196, 1197 (9th Cir.), cert. denied, 469 U.S. 1076 (1984); United States v. Carlson, 617 F.2d 518, 522-23 (9th Cir.), cert. denied, 449 U.S. 1010 (1980). It ruled that the forms W-2 and W-4

were admissible as relevant to show willfulness, although acknowledging that the W-4 forms constitute evidence of other crimes which are admissible to show intent, knowledge, motive, etc., only when the prior crime is similar and close enough in time to be relevant; the evidence of the prior crime is clear and convincing; the crime is an element of the charged offense that is a material issue in the case; and the probative value of the evidence outweighs any unfair prejudice, in accordance to United States v. Bailleaux, 685 F.2d 1105, 1109-10 (9th Cir. 1982). The Court held that the district court was not obliged to admit the legal materials the defendant offered to support his testimony that he relied

on them in forming his belief that he was not required to file an income tax return, and did not abuse its discretion. The Court relied upon its rule in United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981) that since a criminal defendant does not have a right to both self-representation and the assistance of counsel to find that the trial court did not abuse its discretion in refusing to acknowledge the motions filed by the defendant on his own behalf. Finally, the Court held that the defendant failed to show any prejudice resulting from the trial court's denial of a continuance which demonstrates reversible error.

Reasons for granting the petition

1. Prejudicial Effect of Terms Used to Describe Defendant's Activities.

Although the trial court tacitly admitted that designating the defendant as a "tax protester" had the analogous inherent prejudice of designating someone as a "mobster", its specific ruling permitted the prosecution to refer to the documents submitted by the defendant as "typical tax protester literature". The effect of this ruling was to open the floodgates of the prejudicial association against the defendant during the course of the entire trial. The entire tax protest movement became a focal point of the trial. While it is the duty of the government

attorney to use every legitimate means to bring about a just conviction, it is just as much his duty to refrain from improper methods calculated to produce wrongful ones, Berger v. U.S., 295 US 78; Bruno v. Rushen 721 F.2d 1193f (CA9 Cal.1983); U.S. v. McPhee, 731 F2d 1150 (CA5 Tex. 1984); U.S. v. Love, 534 F.2d 87 (CA Mich. 1976). Furthermore, the prosecutor, as much as any other officer in the judicial process, has an obligation to safeguard the right to trial by an impartial jury, U.S. v. Harison, 716 F2d 1050 (CA Md, 1983). Even the extraordinary remedy of a dismissal of an indictment has been upheld where prosecutorial misconduct is determined to have jeopardized a substantial right of a

defendant, U.S. v. Wilson, 712 F.2d 1164 (CA Ill. 1983) The actions of the prosecutors against Mr. Bergman were analogous to those of the prosecution of U.S. v. Tafoya, 757 F2d 1522 (CA5 Tex, 1985) where the allegations dealt with illegal activities in which the defendant had been engaged.

In the instant case, the repetition and persistence in referring to Mr. Bergman as a tax protester, and linking him with organizations and/or groups which supposedly made it their business to violate tax laws, Mr. Bergman was essentially deprived of his defense of a lack of willfulness, and all this despite a pretrial determination by the judge that such labels were not to be attached to Mr.

Bergman or his activities.

Whether the court may accurately characterize the activities in question as "tax protest" and whether such activities in themselves are probative of the defendant's willfulness in violating the tax laws is irrelevant to the use of the terms during the trial in front of a jury when such use is itself an unnecessarily prejudicial influence. The tendency of the Circuits to accept such labels is clearly in conflict with this Court's decisions and so far sanctions a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In U.S. v. Socony-Vaccuum Oil Co., 310 US

150 at 239 this Court said: "...appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be on the alert to prevent them...". During the trial the prosecution attempted to label the defendant as a "tax protestor" by implication. Similar terms were used to allude and refer to "typical tax protestor" material in describing the documents presented and activities of the defendant over forty times during the presentation of evidence and argument. In addition, IRS agent Lawrence Baur, in testifying was allowed to describe his job as working in "drug-related cases, tax-protest cases, failure to file". These repetitious allusions to "tax protest" were nothing more

than a forbidden appeal to the emotions of the jury.

2. Wage and Tax Statements.

The charge in the indictment lists three counts of alleged violations of law against defendant, JIM C.BERGMAN. All three counts charge violations of 26 United States Code, Section 7203 - "Willful failure to file return, supply information, or pay tax." The indictment specifically charged that the Petitioner received certain amounts of income for the three years and knowingly and willfully failed to make a return regarding said income. Petitioner's case, therefore, should have been limited to establishing the

amount of income received, the failure to file a return which the Internal Revenue Service would find acceptable, and that the failure to file a return was willful. In material provided to the Petitioner by the prosecution one day prior to trial, allegedly in accordance with the Jencks Act, it became apparent that the Respondant intended to introduce Petitioner's Forms W-2 and Forms W-4, together with correspondence and other items surrounding the same Forms, for the years specified in the Indictment.

Petitioner objected to the proffered material as the Form W-2 indicated, in some instances, that no withholding tax had been taken out of Petitioner's Salary, and the Forms

W-4 indicated statements, made under penalty of perjury, that the Forms, as submitted, were correct. Petitioner offered, out of the presence of the jury, to stipulate that he hadreceived the amount of money shown on the Form W-2 for the years indicated in the indictment, and even offered to waive any objections to his employer testifying as to the amount of compensation Petitioner received during the subject years. The offer was rejected by the Court.

Objections were interposed against the admission of the Forms W-2 and W-4 on the basis that the alleged falsity of the Form W-4 information, made under penalty of perjury, constituted evidence of other crimes not made

a subject of in the indictment, specifically, crimes enumerated under 26 United States Code Section 7203. Respondant justified their admission on the basis that the statute of limitations for prosecution against Petitioner Bergman would have expired on those charges. The nature of Petitioner's objections were not based upon possible future litigation, but the prejudicial effect Respondant's 'he's guilty of this other crime, but he got away on a technicality', attitude would have had on the minds of the jurors.

In the context of the charges made, the only probative value that even the Forms W-2 could have had would be to establish the amount of compensation received by

Petitioner Bergman. Failure to file when so required to, failure to pay, or the diverting of withholding taxes to one's own use, are entirely different matters. The inclusion of one under the pretext of attempting to prove willfulness on the other was completely unnecessary, and unduly prejudicial. Rather than simply allowing Petitioner to stipulate that the amounts shown on the Forms W-2 were received by Petitioner, Respondant was permitted, over continuing objections, to probe the supposed reasons for the information contained therein.

The prosecution was also permitted to extensively examine witness MARVIN ROSE regarding Petitioner's claiming of exempt

status on a Form W-4. An extensive examination was also allowed regarding the signing of a Form W-4 by Petitioner, dated February 5, 1979 "Under Penalties of Perjury". Cancelled payroll checks for the years 1979,1980, and 1981 were also admitted, and the prosecution was allowed to go into great detail regarding the use of the funds, an issue which was completely irrelevant to the charges brought in the indictment.

> "The general rule on the subject of permitting testimony to be given of matters not alleged is that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue."

Bird v. United States, 180 U.S. 356, 361, 45 L.Ed. 570, 21 S.Ct. 403.

Relevant evidence may still be inadmissible under F.R.Civ.P. Rule 403 if it is unfairly prejudicial necessitating a stipulation or even suppression.

> "While the Government has a right to the probative value of a piece of evidence necessary to prove an element of the crime, Defendant has the right to stipulate to the evidence if the proof of the evidence would be unduly prejudicial."

United States v. Grassi, 602 F.2d 1192 (1979) at 1196-1197, and;

> "Determining the weight to be given an offer to stipulate in the balancing process is committed to the sound discretion of the trial court, tempered by the particular facts presented."

United States v. Grassi, supra, at 1197.

Judicial discretion is not only limited by the

facts presented by also is necessarily limited by the Constitution. United States v. Davis, 639 F.2d 239 (1981) at 244. The United States Constitution guarantees every criminal defendant a fair trial.

> "The bars which guard fair trials guaranteed by the Constitution are court procedure, rules of evidence and jury instructions. These bars must not be lowered."

Miller v. United States, 120 F.2d. 968.

In a I.R.C. Section 7203 prosecution for willful failure to file a return, such as this one, evidence may properly be introduced on the three elements of the alleged crime: was a return required, failure to file the required return, and willfulness. Evidence not relating

to these elements cannot properly be considered by the jury and the Court abused it's discretion in allowing the prosecution to proceed as it did.

3. Refusal of Continuance as Violation of Provisions for Adequate Counsel.

In ruling on a motion for a continuance, the trial judge may have a certain amount of discretion. However, he may not insist on such expeditiousness that counsel lacks reasonable time to prepare for the trial; stripping away the opportunity to prepare for trial is tantamount to denying altogether the assistance of counsel, U.S. v. Burton, 584 F.2d 485, 189 (CA DC 1978). This same case further held that motions for continuance may

not properly be denied on the sole ground that the time sought is longer than necessary to retain new counsel or to prepare for trial, since unjustifiably long requests, if otherwise reasonable, can simply be granted for a shorter period. 18 United States Code § 3161(c)(2):

Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

In the instant case, defendant appeared through counsel less than two weeks before trial. No consideration whatsoever was given

by the court to the factors considered to be relevant in assessing claims of inadequate time to prepare for trial. Although appointment of the Public Defender was made, it was done solely as a formality which in effect denied the defendant his right to adequate counsel if allowed to serve as the basis for denying the defendant's counsel of choice the time necessary to prepare his case. He certainly derived no benefit from such appointment, appointed counsel assisted in no way, moved to withdraw on the grounds of disagreement with the law, and served only to prevent the defendant from pleading his own case.

The interest of the court is in ensuring

that a defendant has a fair adversarial proceeding, and it assumes great significance in criminal cases. Normally, reluctance of a trial judge to grant continuances should give way when there is significant potential that counsel's performance will be adversely affected, U.S. v. Rodgers, 755 F.2d 533 (CA III, 1985). A change of counsel close to the date set for trial may, under some circumstances, warrant a continuance to permit adequate time for preparation of a defense, U.S. v. Walden, 578 F2d 966 (CA Pa, 1978). When defense counsel makes reasonable requests for continuance in a highly complex case and is afforded only ten days following arraignment to prepare for trial, denial of the

motion constitutes abuse of discretion and violates Sixth Amendment right to counsel, U.S. v. Gallo, 763 F2d 1504 (CA6 Ohio, 1985).

The Appeal Court's ruling that no prejudice resulted from its denial is simply without foundation. The denial resulted in the defendant's not being properly represented by counsel of his choice at every critical stage of the criminal proceedings. The rational of this Court in its holdings in such landmark cases as Gideon v. Wainwright, 372 US 335 (1963) and Argersinger v. Hamlin, 407 US 25 clearly establish the principle that without adequate counsel the accused cannot receive a fair trial. It is impossible to say that, given adequate preparation, the defense could not

have produced testimony and admissible evidence which could have convinced the jury of the support for defendant's claim of lack of willfulness. Therefore, the refusal of the trial court to grant any continuance at all is clearly inconsistent with the holdings of this Court.

4. Excluded Evidence Denial of Substantial Element of Defense.

Intent was made the essential element of the charges against the defendant herein. Although the defendant's refusal to answer was intentional and without legal justification, the jury might nevertheless find that it was not prompted by bad faith or evil

intent, United States v. Murdock, 290 US 389 (although involving predecessor statutes to section 7203, in all material respects they are identical). A good faith ciaim of privilege against self-incrimination, although erroneous, is a defense to the element of willfulness which is necessary for a conviction under 26 U.S.C. § 7203, Garner v. United States, 424 US 648.

The defendant's intent is to be determined on a subjective rather than objective basis. Willfulness is totally subjective, and it does not matter if the beliefs held are unreasonable or even far-fetched. The only proper test is whether or not the beliefs were sincerely held. United States v. Aitken, 755 F.2d 188

(CA1 1985); United States v. Burton, 737 F.2d 439, (CA5 1984); and United States v. Phillips, 755 F.2d 262 (CA10 1985).

Naturally, it is impossible for the jury to determine whether or not the beliefs were sincerely held without knowing with some particularity what the beliefs were. The defendant offered into evidence the documents he relied upon in establishing his beliefs that he properly asserted his Constitutional objections on his income tax return. The Court of Appeals held that it was not an abuse of the trial court's discretion in excluding legal materials on the basis of relevancy, since it allowed the defendant to testify that he relied on those documents.

Since this Court has held in United States v. Bishop, 412 US 346 (1973) that reliance on their prior decisions serves to vitiate willfulness, and since willfulness is undisputably a matter of fact for the jury, it is obvious that evidence which tends to substantiate the defendant's claim of reliance cannot be irrelevant. "Relevant evidence" means evidence having any tendency to make the existance of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. Evid. Rule 401. The standard of relevance established by Rule 401 is not high, Carter v. Hewitt, 617 F.2d 961 (CA3 1980). The consideration is not

whether the cases are relevant - for they surely are; the question is whether, and to what extent, they should be admissable as measured by other considerations, such as "causing the trier of fact to become the trier of law", "confusion of the issues," or some other prophylactic and/or esoteric rule.

It is true that appellate courts have held that the trial judge does not exceed his discretion when he rejects the admissability of court opinions, United States v. Bernhardt, 642 F2d 251 (CA8 1981); United States v. Kraeger, 711 F2d 6 (CA2 1983); Cooley v. United States, 501 F2d 1249 (CA9 1974). This evidentiary rejection is always on grounds that the admission of court opinions into

evidence "causes the trier of fact to become the trier of the law", or because they might "confuse" the jury. A broad-brush application of this reasoning is contraindicated in the instant case because, (1) the jury would not have been caused to become the trier of what the law is, or ought to be; in other words, for the truth of the legal conclusion asserted, but instead would merely have been given a chance to perceive and appreciate what the defendants perceived in formulating his belief. This is a matter of fact.

In addition, it has been held that when willfulness is an element of the offense charged, the defendant should be afforded wide latitude in the introduction of evidence,

United States v. Garber, 607 F2d 92 (CA5 1979); United States v. Burton, 737 F.2d 439 (CA5 1984) and United States v. Platt, 435 F.2d 789 (CA2 1970). This, of course, is in keeping with the philosophy of letting in all facts which might be helpful to the jury in making the final determination of the criminal responsibility of the accused, United States v. McRary, 616 F.2d 181 (CA5 1980). Furthermore, this Court, in United States v. Agurs, 427 US 97, said that in the case of a questionable or close verdict, additional evidence of even relatively minor importance might be sufficient to create reasonable doubt. This was such a close case, the verdict clearly hung on the issue of whether the jury

believed the testimony of the defendant with regard to his belief.

In United States v. Ebner, 782 F.2d 1120, 1125-26 (CA2 1986), portions of a state court opinion were held to be "clearly relevant" to intent, and were admitted into evidence. The distinction seems to be that court opinions are relevant when inculpatory, but are not relevant when exculpatory. Also, in this case the government was permitted wide latitude in presenting evidence which was considered to have probative value in determining the guilt of the defendant because it was relevant toward the contested issue of willfulness.

This reasoning seems clearly contradictory to the policy of this Court. See Brady v.

Maryland, 373 US 83 (1963). It would be totally incongruous to require the government to divulge to the accused any exculpatory evidence in the interests of due process; but, on the other hand, deny that due process requires the equal right to present such evidence to a jury.

5. Infringement upon the Right to Self-representation.

In this case the trial court refused to acknowledge the defendant's determination to represent himself; appointing the Public Defender, and striking the defendant's filings in proper person.*

The trial court placed the defendant in the position of choosing between and subsequently

surrendering either the Right to assistance of counsel or the Right to participate in his own defense by insisting that appointed counsel represent him. In order to acquire the assistance of counsel, the court required that the defendant waive the right to represent himself.

Title 28 USC § 1654 provides that in all Courts of the United States the parties may plead and conduct their own cases personally or by counsel. The trial court must grant a defendant's request to represent himself

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*Subsequently, the defendant retained his own counsel, and was permitted limited participation at trial. This issue involves the pre-trial motions filed by the defendant while restricted by the court appointment of the Public Defender.

which is properly asserted before trial since this is not a matter of discretion, United States ex rel. Maldonado v. Denno (1965, CA2Ny) 348 F2d 12, cert den 384 US 1007; United States v. Dunlap (1978, CA 4 Md) 577 F2d 867, cert den 439 US 858. However, it is said that the accused does not have the right to both represent himself and retain the assistance of counsel since the provisions of § 1654 state the accused's right to counsel and to represent himself in the alternative, and because of the court's unwillingness to recognize a form of representation which will have counsel occupy an inferior position in the prosecution of an accused. See Shelton v. United States (CA5 La, 1953) 205 F2d 806,

cert denied 346 US 892 and motion to vacate den 349 US 943; United States v. Halpert (CA9 Cal, 1981) 640 F2d 1000.

Yet, this Court has said that the right to represent oneself flows from the Sixth Amendment to the United States Constitution, Faretta v. California (1975) 422 US 806, 95 S Ct. 2525. The right to assistance of counsel includes the right to counsel of the defendant's choosing, when the accused is financially able to retain counsel, United States v. Burton (DC CA, 1978) 584 F2d 485, cert denied 439 US 1069. The right is subject to reasonable limitations only since the right may not be used to subvert trial or to effect other dilatory purposes, therefore permitting

government to prosecute 9 counts together against the defendant did not unreasonably limit his right to represent himself, United States v. Coupez (CA9 Wa) 603 F2d 1347.

Chief Justice Burger in his concurring opinion in Mayberry v. Pennsylvania (1971) 400 US 455 suggested the wisdom of having counsel appointed as "standby" counsel to assist with procedural matters rather than "represent" the defendant. This approach would assure the protection of the Sixth Amendment while also protecting the public's interests in the integrity of the judicial process, without unreasonably interfering with the rights of the accused.

Although the question that one may not be

"represented" by an attorney and by oneself appears settled, this case presents the unresolved question of whether one's right to conduct his own case and have the assistance of counsel are compatible in the federal courts.

6. Directing Verdict on Element of Offense as Violation of Right to Trial by Jury.

The rule is firmly established that the trial judge cannot direct a verdict in favor of the government for all or even one element of a crime, not even an undisputed fact may be determined by the judge even if the evidence weighs heavily on the side of the prosecution. See United Brotherhood of Carpenters and

Joiners of America v. United States, 330 U.S. 395, 408; United States v. Goetz, 746 F.2d 705 (11th Cir. 1984); United States v. England, 347 F.2d 425 at 430 (7th Cir.); United States v. Aitken, 755 F.2d 188 (1st Cir. 1985) and United States v. Burton, 737 F.2d 439 (5th Cir. 1971). Nor can it be said that such an error can ever be considered harmless. See United States v. Ragsdale, 438 F.2d 21 (5th Cir. 1971) and United States v. Bosch, 505 F.2d 78 (5th Cir. 1974).

There are three elements that must be proven by the prosecution in order to sustain a 26 USC § 7203 charge. They are:

1. That the individual is required to file;

2. That the individual failed to file; and

3. That the individual's failure to file was willful.

In his charge to the jury the judge stated:

"In order for a 1040 form to constitute a return, within the meaning of Section 7203, it must contain sufficient financial information to enable the Internal Revenue Service to determine a tax liability for the individual, or individuals, submitting the 1040 form. Documents duplicating in part United States Individual Income Tax Return form 1040, but containing no financial data, are not tax returns, for purposes of Section 7203."

It is plain from the reading of the trial court's instruction that the trial court judge directed a verdict of guilty to the second

element of the Section 7203 charge, i.e. that the individual failed to file a return. This is impermissible and Defendant's right to a fair trial was prejudiced as the Court's error cannot be held to be harmless. Therefore, it is plain that the Court of Appeals determination that the defendant's objection to this instruction has no merit* conflicts with the applicable decisions of this Court.

Our system mandates that to be found guilty of a crime, a defendant must be charged and convicted according to proper legal procedures and standards, Wilson v. U.S. 250 F.2d 312, 324 (9th Cir. 1958). Application of facts to the law was for the jury to determine, U.S. v. Goetz, supra.. In addition,

the instruction directly contradicts applicable decisions of this Court as well as decisions of other Circuits. See United States v. Barnes, 604 F.2d 121, 148 (2nd Cir. 1979):

"...However, as is made clear in United States v. Sullivan, 274 U.S. 259, 263-64, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), the right to make a valid claim of privilege is available even as to the amount of a taxpayer's income,..."Therefore, whether the tax returns

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*Opinion, n.1 "Bergman, acting on his own behalf, also challenges various jury instructions in his "Supplement to Defendant/Appellant's Opening Brief." He has not sought permission of this court to act on his own behalf and the document was filed outside the time provided by our order of September 9, 1986. Nevertheless, we find no merits to the arguments raised."\

in question were valid, was a matter for thejury to decide.

7. Reference to Defendant's Tax Liability in the Instructions to Jury Impermissible.

In his charge to the jury the trial judge stated:

"The word willfully, used in connection with this offense, means deliberately and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return, which the defendant knew he should have filed, in order to prevent the government from knowing the extent of his tax liability, or, facts material to the determination of his tax liability."

A conviction was reversed in the case of United States v. Walker, 479 F.2d 407 (9th Cir. 1973) in which the Government, after proving that the defendant was required to file a tax return by showing defendant's gross income, submitted evidence proving an increase in defendant's net worth. The Court held that this was prejudicial error because the Government had already proved that the defendant was required to file a return. See also United States v. Gorman, 593 F.2d 209 (7th Cir. 1968), concerning five counts of failure to file tax returns where proof of tax liability was held to be irrelevant where testimony showed that the amount of tax owing was not the reason returns were not

filed. Tax liability has no bearing on the issue of whether the defendant is required to file. The sole purpose of the government in introducing any reference to such at all is to prejudice the jury.

The defendant contends that the mere use of the term "tax liability" in the charge in question constitutes a highly prejudicial statement. This was not a case of tax evasion, in which the government, under 26 U.S.C. § 7201 was required to prove that defendant willfully attempted to evade or defeat a tax. Tax liability has no bearing on the issue of whether the defendant is required to file. The sole purpose of the government in introducing any reference to such at all is to

prejudice the jury. The voluminous amount of evidence of tax evasion admitted during the trial made it impossible for the jury to separate in their minds a case of tax evasion from a simple misdemeanor case of failure to file, where the Court has introduced a jury instruction concerning tax liability.

APPENDIX - A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, V JIM C. BERGMAN DEFENDANT-APPELLANT.	No. 86-1102 D.C. No CR-LV-85-170-PMP OPINION

Submitted February 10,1987*

Filed March 31, 1987

Before: Procter Hug, Jr., Mary M. Schroeder
and
William A. Norris, Circuit Judges.

Opinion by Judge Hug

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, Magistrate, Presiding

Summery

Criminal procedure

Appeal from conviction. Affirmed

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*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 3(f)and Fed. R. App. P. 34(a).

This action arises from appellant Bergman's conviction for failure to file federal income tax returns. Bergman contends that the district court erred by: (1) allowing the government to refer to him as a tax protester; (2)admitting his wage and tax statements; (3) excluding some of his exhibits; (4) striking his pro se flings when he was represented by counsel; (5) refusing to grant a continuance.

(1) Bergman's objections to fling tax returns have been rejected repeatedly by this court References to Bergman's tax protest activities were also probative of his willfulness in violating the tax laws.(2)Since the fling of false W-4 forms could provide the basis for prosecution, this court agrees that they are evidence of other crimes. (3) Here, the forms were similar and close in time to the violations a tissue. They showed Bergman

was claiming exempt status even though there was clear evidence that he incurred income tax liability in the previous years. And finally, the forms were highly probative of Bergman's willful scheme of evading federal income tax laws.

(4) This court has considered the precise claims Bergman raises here and held that the district court was not obliged to admit legal materials as evidence and did not abuse its discretion. (5) A criminal defendant does not have an absolute right to both self representation and the assistance of counsel. (6)Bergman has failed to show that the denial of a continuance prejudiced his defense.

COUNSEL

Alan R. Harter, Las Vegas, Nevada, for the defendant-appllant.

Robert E. Linday, \Washington, D.C., and Donald. W. Searles, Washington, D.C., for the plaintiff appellee.

OPINION

Hug, Circuit Judge:

Jim Bergman appeals a Jury conviction for willful failure to File federal income tax returns in violation of 26 U.S.C. § 7203 (1982). Bergman contends that the district court erred by: (1) allowing the government to refer to him as a tax protester; (2) admitting his wage and tax statements (W-.2 and W-4 forms); (3) excluding some of his exhibits; (4) striking his pro se flings when he was represented by counsel; and (5) refusing to grant a continuance. We disagree

and affirm. [1]

FACTS

Bergman worked as an electrician earning $37,834.97 in 1979, $39,701.39 in 1980, and $46,702.07 in 1981. During this period Bergman fled federal tax returns containing no information other than his name, address, and signature. He completed the returns by inserting asterisks corresponding to a notation on the bottom of the return stating that he did not understand the return or the laws which may apply to him, and objecting on the basis of the lst, 4th, 5th, 7th, 8th, 9th,10th, 13th, 14th,and 16th amendments. Bergman attached to his returns affidavits and letters challenging the federal

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1 Bergman, acting on his own behalf also challenges various jury instructions in his "Supplement to Defendant/Appellant's Opening Brief" He has not sought permission off this court to act on his own behalf and the document was fled outside the time provided by our order of September 9, 1986. Nevertheless, we find no merits to the arguments raised.

taxation fling system. Bergman also filed W-4 forms claiming that he was exempt from withholding.

The Internal Revenue Service ("IRS") notified Bergman that his returns were unacceptable and requested that he file proper returns. Bergman did not do so.

Bergman subsequently was indicted for failing to file income tax returns. The court appointed a public defender to represent Bergman. Shortly before trial, Bergman discharged the public defender and retained his own attorney. Although Bergman fled two motions on his own behalf, he was represented by counsel throughout the proceedings.

DISCUSSION

1."Tax Protester"

Bergman contends that he was prejudiced at trial because the Government continuously referred to him as a tax protester. He argues that the references were prejudicial because they associated him with a conspiratorial group of lawbreakers and deprived him of presenting a willfulness defense. We disagree.

(1) The term "tax protestor", accurately characterizes Bergman's activities. His objections to filing tax returns, based principally on the Fifth Amendment, have been rejected repeatedly by this court. United States v. Malquist, 791 F.2d 1399, 1402 (9th Cir.) cert. denied 107 S. Ct. 445 (1986);

United States v. Smith, 735 F.2d 1196, 1197 (9th Cir.), cert. denied 469 U.S. 1076 (1984); United States v. Carlson, 617 F.2d 518, 522-23 (9th Cir.), cert.

denied 449 U.S. 1010 (1980). References to Bergman's "tax protest" activities were also probative of his willfulness in violating the tax laws. Carlson 617 F.2d 218, 221 (5th Cir. 1981). Consequently, we agree with the other courts that have found the term .,tax protester" a permissible shorthand reference to such activities. See e,g., United States v. Turano, 802 F.2nd 10, 12 (lst Cir. 1986).

2 Wage and Tax Statements

Bergman argues that the district court erred by admitting as evidence his W-2 and W-4 forms. He argues that these forms were unduly prejudicial and irrelevant because he was willing to stipulate to the information contained in those forms. We review the district court's decision for an abuse of discretion. Maiquist, 791 F.2d at 1402.

The court's decision to admit the W-2 forms did not amount to an abuse of discretion.

Information regarding Bergman's earnings was necessary to show that he was required to file a tax return. 26 U.S.C. § 6012(a) (1982); United States v. Baras, 633 F.2d 1356, 1358 (9th Cir. 1980). Even though Bergman was willing to stipulate to the amount of his income, the forms were still relevant to show willfulness-an issue which Bergman clearly contested. See e.g., United States v. Green, 757 F.2d 116, 119-20 (7th Cir. 1985). Finally, irrespective of the relevance of the W-2 forms, Bergman has shown no prejudice resulting from the admission.

(2) Bergman objects to the W-4 forms as impermissible evidence of other crimes. See Fed. R. Evid. 404(b). Since the filing of a false W-4 form could provide the basis for prosecution under 26 U.S.C. §7205 (1982),we agree that it is evidence of "other crimes" under Rule 404(b). Nevertheless, evidence of other crimes may be

admissible to show intent, knowledge, motive, etc., if: (I) the prior crime is similar and close enough in time to be relevant; (2) the evidence of the prior crime is clear and convincing; and (3) the crime is an element of the charged offense that is a material issue in the case. United States v. Bailleaux, 685 F.2d 1105, 1109-10 (9th Cir. 1982). The probative value of the evidence must also, outweigh any unfair prejudice. Id.; Fed. R. Evid. 403.

(3) Here, the W-4 forms were similar and close in time to the section 7203 violations-they were filed during the same years. The forms showed that Bergman was claiming "exempt" status even though there was clear evidence that he had incurred income tax liability in the previous years and had failed to file proper tax returns. And finally, the forms were highly probative of Bergman's willful scheme of evading federal

income tax laws. See Carlson, 617 F.2d at 519, 523-24; see also United States v. Verkuilen, 690 F.2d 648,656 (7th Cert. 1982)

3 Excluded Evidence

(4) Bergman objects to the district court's exclusion of certain documents he relied on in deciding not to file income tax returns. These documents included a copy of the Constitution and Declaration of Independence, transcripts of "winning cases" against the IRS, and the entire Internal Revenue Code. The district court excluded the documents on the basis of relevancy but allowed Bergman to testify that he relied on the documents in forming his belief that he was not required to file an income tax return. In Malquist, 791 F.2d at 1402, we considered the precise claim that Bergman raises here. We held that the district court was not obliged to admit legal materials as evidence and did not abuse

its discretion. Id. We reach the same conclusion here.

4 Pro Se Filings

(5) We find no error in the district court's refusal to acknowledge Bergman's pro se filings. A criminal defendant does not have an absolute right to both self representation and the assistance of counsel. United States v. Holbert, 640 2d 1000, 1009 (9th Cir. 1981). The decision to allow such hybrid representation is within the sound discretion of the judge. Id. Bergman has shown no abuse of discretion here.

5 Continuance

(6) Bergman challenges the district court's denial of his request for continuance. We will not overturn the denial absent a clear abuse of discretion. United States v. Lane 765 F.2d 1376, 1379 (9th Cir. 1985). "To demonstrate reversible error, the defendant must show that the denial

resulted in actual prejudice to his defense." Id In this case, Bergman claims that he was not allowed adequately to research, brief, and prepare motions challenging the use of the terrn "tax protester," the admission of his W-2 and W-4 forms and other "highly prejudicial" information, and the exclusion of his proffered documents. We have discussed each of these objections above and concluded that the district court committed no errors. Consequently, Bergman has failed to show that the denial of a continuance prejudiced his defense.

AFFIRMED.